

**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

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| NORTHERN ILLINOIS GAS COMPANY                   | ) |                    |
| d/b/a NICOR GAS COMPANY                         | ) |                    |
|   | ) | Docket No. 10-0096 |
| Application pursuant to Section 9-201 and       | ) |                    |
| Section 19-140 of the Illinois Public Utilities | ) |                    |
| Act for consent to and approval of Rider 31,    | ) |                    |
| On-Bill Financing Program and related           | ) |                    |
| changes to Nicor Gas' tariffs, and approval     | ) |                    |
| of the Energy Efficiency On-Bill Financing      | ) |                    |
| Program.  | ) |                    |

**VERIFIED ADDITIONAL COMMENTS  
OF NICOR GAS COMPANY**

Northern Illinois Gas Company d/b/a Nicor Gas Company ("Nicor Gas" or "Company") respectfully submits its Verified Additional Comments pursuant to the Administrative Law Judge's ("ALJ") Ruling issued on March 25, 2010 ("ALJ Ruling"). Specifically, the ALJ requested the parties to address the following items:

- 1) which taxes might apply to the On-Bill Financing Program ("OBF Program" or "Program") revenue;
- 2) whether the Commission has jurisdiction to determine the applicability of those taxes;
- 3) whether the determination needs to be made in these dockets; and
- 4) the legal/factual basis for proposing that a particular tax does or does not apply.

ALJ Ruling, p. 1

**I. Introduction**

On February 2, 2010, Nicor Gas filed its proposed tariff and Plan for its On-Bill Financing Program ("OBF Program" or "Program"), as required by Section 19-140 of the Public Utilities Act ("the Act"). 220 ILCS 5/19-140. On March 2, 2010, the Staff of the

Illinois Commerce Commission, (“Staff”), the People of the State of Illinois (“AG”), and the Citizens Utility Board (“CUB”) filed verified comments responding to Nicor Gas’ proposed OBF Program. On March 12, 2010, Staff, AG and CUB filed Verified Reply Comments responding to each other’s initial comments. Nicor Gas filed its Verified Reply Comments to both the direct and reply comments of Staff, AG and CUB on March 22, 2010.

In its direct comments, CUB raised the issue of applicability of the State Gas Revenue Tax to utility revenue received as part of the OBF Program, proposing that the tax should not apply to these revenues. In its reply comments, the AG agreed with CUB. Staff also agreed with CUB, relying on a memorandum from the Illinois Department of Revenue as support for its position. After reviewing the reply comments of Staff, AG, and CUB and the memorandum from the Illinois Department of Revenue, Nicor Gas also concurred that the State Gas Revenue Tax should not be applied to the OBF Program revenue. However, in its reply comments, North Shore Gas Company and The Peoples Gas Light and Coke Company (“NS/PGL”) disagreed with this assessment, stating that they would apply the Gas Revenue Tax to OBF Program revenues unless the Illinois Department of Revenue issued a binding opinion concluding that such revenue is exempt from the Gas Revenue Tax. NS/PGL Reply Comments, p. 8.

In addition to the Gas Revenue Tax issue, Nicor Gas and NS/PGL raised similar concerns with respect to the State Utility Fund Tax. Nicor Gas Reply Comments, p. 11; NS/PGL Reply Comments, p. 8. NS/PGL also raised issues with the applicability of municipal taxes. NS/PGL Reply Comments, p. 8.

## **II. Response to ALJ Issues**

### **A. Which taxes might apply to On-Bill Financing Program revenue?**

There are three distinct taxes that are at issue in this proceeding. First, the Gas Revenue Tax Act, 35 ILCS 615, provides that gas utilities pay to the state a tax based on the lesser of five percent of their gross receipts or 2.4 cents per therm. Second, the State Utility Fund Tax, Section 2-202 of the Public Utilities Act (“the Act”), provides that utilities pay to the Commission a tax of 0.1 percent of the utility’s gross receipts. 220 ILCS 5/2-202. Section 9-222 of the Act allows utilities to pass through these taxes to their customers. 220 ILCS 5/9-222. Finally, as provided by Section 8-11-2 of the “Illinois Municipal Code”, a municipality may enact an ordinance requiring a gas utility to pay taxes of up to five percent of its gross receipts derived from customers within the municipality’s boundaries. Section 9-221 of the Act allows gas utilities to pass through these taxes to their customers, along with a three percent accounting cost recovery fee, *i.e.* 3% of 5%, for a 5.1%total tax rate. 220 ILCS 5/9-221

### **B. Does the Commission have jurisdiction to determine applicability of those taxes?**

It is Nicor Gas’ position that the Commission only has jurisdiction over the State Utility Fund Tax. The other two taxes owe their creation through statutory provisions not found in the Act, the Gas Revenue Tax Act and the Illinois Municipal Code. The Commission’s jurisdiction is derived from, and limited to, the Act. Thus, the Commission does not have jurisdiction to determine the applicability of state and municipal taxes to OBF Program revenues. Any determination that the Commission offers regarding the applicability of these taxes would have no binding effect on the Illinois Department of Revenue, any municipality or any utility customers.

**C. Does the determination of applicability need to be made in this docket?**

It is Nicor Gas' position that the Commission has jurisdiction over the applicability of the Utility Fund Tax, and that this proceeding is the proper forum for the Commission to determine whether the Utility Fund Tax should apply to OBF Program revenues.

**D. What is the legal/factual basis for proposing that a particular tax does or does not apply?**

It is Nicor Gas' position that the determination of whether a particular tax applies must be based on the enabling legislation and the requirements of the Illinois State Constitution.

**E. North Shore Gas' and Peoples Gas' Comments**

NS/PGL state that it is their intent to apply the Gas Revenue Tax to the OBF Program revenues unless they receive a binding opinion from the Illinois Department of Revenue to do otherwise. To receive such an opinion can be time consuming and costly. NS/PGL proposes to recover the costs associated in obtaining the opinion as an OBF Program cost. NS/PGL has reviewed the Illinois Department of Revenue's memorandum attached to Staff's Reply Comments but has not taken a position on it.

It is Nicor Gas' position that, absent controlling legal authority to the contrary, it may rely on the Department of Revenue's memorandum to determine that the State Gas Revenue Tax should not be applied to the OBF Program revenues.

Nicor Gas has no objection to NS/PGL pursuing the option of obtaining additional assurances from the Illinois Department of Revenue. The OBF Programs are not proposed to go into effect until June 1, 2011, when the state-wide energy efficiency programs become effective under Section 19-145 of the Act. Consequently, there is

some time for NS/PGL to seek such assurances. If NS/PGL proceeds with this option, the cost to obtain such assurances should be considered prudent and included in the OBF Program costs.

### **III. Conclusion**

It is Nicor Gas' position that the Commission only has jurisdiction over the issue of the applicability of the State Utility Fund Tax to the OBF Program revenues. Therefore, Nicor Gas respectfully requests that the Commission determine the applicability of the Utility Fund Tax to the OBF Program revenues in this proceeding.

Dated: March 31, 2010

Respectfully submitted,

NORTHERN ILLINOIS GAS COMPANY  
D/B/A NICOR GAS COMPANY

By: /s/ John E. Rooney  
One of its attorneys

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**CERTIFICATE OF SERVICE**

I, John E. Rooney, an attorney, hereby certify that I caused a copy of the Verified Additional Comments of Nicor Gas Company to be served upon the service list in Docket No. 10-0096 via email on March 31, 2010.

/s/ John E. Rooney  
John E. Rooney